United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1132

B P/S

To be argued by
ABRAHAM SOLOMON

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Respondent,

-against-

PATSY ANATALA,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered March 24, 1976 in the United States District Court for the Southern District of New York (Bonsal, J.) convicting Appellant Anatala after trial of conspiring to distribute Schedule I and II narcotic drugs in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, U.S.C. Appellant was additionally convicted of distributing a narcotic drug and the unlawful distribution of heroin in violation of Title 21, U.S.C. Sections 812, 841(a)(1) and 841(b)(1)(A). Appellant was sentenced to concurrent terms of imprisonment of three years on each count to be followed by a three year special parole.

QUESTIONS PRESENTED

1. Whether, as a matter of law, multiple conspiracies were established by the Government as opposed to the single conspiracy charged in the indictment, and whether, since this variance between the indictment and the proof affected Appellant's Due Process right to a fair trial, his conspiracy conviction must be dismissed and a new trial ordered on the substantive counts.

2. Whether Appellant was deprived of his constitutional rights under the Fifth and Sixth Amendments, to a fair trial by an impartial jury, since some of the jurors had overtly expressed their hostility to the defendants' case.

STATEMENT OF FACTS

On January 21, 1976, Appellant Anatala and six co-defendants proceeded to trial before the Hon. Dudley Bonsal on an indictment charging them with conspiring to violate the narcotic laws from January 1, 1968 up to and including June of 1973. The indictment additionally named four other defendants and eleven co-conspirators as participants in said crime. Aside from the conspiracy charge, various defendants were also charged with 21 substantive counts of narcotic law violations. Appellant Anatala was specifically charged in count 14 with distributing a narcotic drug with one William Huff. Count 21 of the indictment charged him with the unlawful distribution of heroin.

The Government's key witness was ANTHONY MANFREDONIA, who allegedly was the focal point of the wide-range drug conspiracy. Manfredonia began selling heroin with Vito Panvarino in 1966. Their main customer was the Defendant Blanchard. After terminating his relationship with Panvarino, Manfredonia then became associated with Angelo Memone. Their partnership was but a brief one, and in 1967 Manfredonia became formally associated with the Defendant Iarossi ("Big Lou") (381-390)*, who thereafter introduced him to Vincent Papa at the Astoria Colts Club in Queens (381-391). The men made arrangements with Papa for the delivery of heroin to either Manfredonia's or Iarossi's house. This heroin was later sold to the Defendant Blanchard (396). Hence, during the period of 1967 through 1969, Manfredonia and Iarossi would go to the Astoria Club twice a month to make arrangements for the delivery of the heroin (396).

It was in 1969 that Manfredonia found another source of heroin. At that time, Defendant Panebianco came to Iarossi's basement with a sample of heroin which he wanted them to test. After telling Defendant Panebianco that they were experiencing difficulty in getting goods, Panebianco responded that they could get one half a kilo from him (410-12). However, because their customer Blanchard had already received the heroin, Panebianco was told that they would not need the one half kilo (415). Manfredonia's main source, however, continued to be Vincent Papa in Queens (415).

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*Numerical references are to pages of the trial transcript.

It was also around this same time in 1969 that Iarossi introduced Manfredonia to Alvin Clark and Mary Mobley, his Pittsburgh customers (417-422). Manfredonia was not the only supplier of heroin for the Pittsburgh group. Clark and Mobley first received the heroin from Iarossi, who was known to them as "Big Lou." It was Iarossi who later introduced Mobley to "Ralphie" (Manfredonia) and instructed her that if he were not there, she would receive the narcotics from him. She began thereafter to pick up packages from Manfredonia from the end of 1968 to the middle of January of 1970 (51-55, 61). In the summer of 1970, Clark introduced her to still another source, Graziano Rizzo "Gu-Gu"). From the summer of 1970 through August of 1971, she received packages of narcotics from both Graziano and Leonard Rizzo. On one occasion, she received a package from Defendant Croce, who was introduced to her through the Rizzo borthers (85-190).

In the meantime, Manfredonia broke his leg in December of 1969, and was hospitalized for one and a half months (428). After he left the hospital, he and Iarossi sold Blanchard one half kilo of heroin in Baltimore. This was in February or March of 1970 and it was at this point that Manfredonia stopped dealing in narcotics (433).

According to this witness, he did not start dealing again until September or October of 1970, when he was introduced to Joe Barone. He was informed that Barone's main customer was G.T. Watson, and that Barone got his heroin from

Alessi, Passero, and Papa (433). Both Manfredonia and Barone then decided to deal in narcotics together and during the period of 1970 to February of 1971, the two men sold narcotics to Watson, Clark, Defendant Brooks, and Defendant Blanchard (437-443). The men used Thomas Murray to deliver the heroin to Clark in Pittsburgh.

During the year 1971, Manfredonia's other sources for heroin were Defendant Panebianco and the Defendants Graziano and Leonard Rizzo (454). In July of 1971, Manfredonia was supposed to receive one half kilo of heroin from Passero and the Amato brothers, but the Amato brothers got arrested, and Manfredonia had to get the needed heroin from Defendant Panebianco (459).

Manfredonia did not meet Appellant Anatala until the fall of 1971, when Anatala told him that he needed some goods in order to do business with his customer, Huff. Subsequently, both Manfredonia and Appellant delivered narcotics to Huff. Manfredonia would give the heroin to Appellant, who would take it to Huff and return with the money. Manfredonia would then pay for the heroin and split the profit with Anatala and Barone (464-465). These transactions took place on about six to eight different occasions. During this interval, Manfredonia only received the narcotics once from Queens, and the balance of the goods he received from Louis Inglese (463).

Manfredonia also acknowledged that he was acquainted with the Defendant Leonard Rizzo. In the early part of 1971, Leonard stated that he could get him one quarter kilo of heroin and a few hours later, the deal was consummated when Manfredonia gave Leonard $5000 in exchange for this heroin (468).

In 1972, Manfredonia dealt in heroin on only three occasions. He gave Clark one quarter kilo of heroin and later learned that Clark had been arrested at the airport with it. Additionally, he had two narcotic transactions with the Defendant Blanchard who, after the last transaction, expressed his dissatisfaction with the goods. Accordingly, Manfredonia did not deal with him again (473).

THOMAS MURRAY, who delivered the narcotics for Manfredonia and Barone to their various customers, met Appellant Anatala, along with Graziano Rizzo at Manfredonia's house in 1972. Murray had previously known Anatala from a card game. At this time, Rizzo took out a package and received some money from Manfredonia. An argument then ensued regarding the price of this package (702).

Subsequently, Murray met Anatala's customer, Huff. Appellant asked Huff if he was ready to do business, and Huff in turn responded that he was ready. He gave some money to Barone who thereafter gave Murray a package to deliver to Huff (7).

SERGEANT ARTHUR WATSON had been involved in the police investigation of Manfredonia in 1972 (1018).

Specifically, on March 7, 1972, G.T. Watson, his informant, took him to Webster Avenue where he observed Watson conversing with Barone (1019). On another occasion, he observed Watson talking to Barone and Murray. The Sergeant was then introduced to Murray, who told him that when the heat was off, they could then deal (1020, 1022-23).

In the latter part of April, Watson was observed conversing with Fiore Rizzo, the uncle of the Defendants, Grazi[illegible] and Leonard Rizzo. On April 26th, the Sergeant gave Watson $5000, and later that evening, Fiore Rizzo passed a package contain[illegible] narcotics to Watson (1049).

Subsequently, on November 21, 1972, Watson had a conversation with Barone while Appellant Anatala was in the car in the driver's seat (156). Four days later, the Sergeant followed Watson to Zerega Avenue in the Bronx, where he saw Appellant Anatala standing by a station wagon. After their conversation, the men went to a house where Appellant kept pointing to the garage. The Sergeant then went into the garage and removed a brown bag from the shelf, which contained heroin (1061)

In the latter part of 1972 and the early part of 1973, DETECTIVE RALPH NIEVES was functioning as an undercover agent in the northeast Bronx with regard to the Police Department's investigation of one Collin Carroll. During this period, he made several purchases of heroin from Carroll and later came to know that Nevado was the source of Carroll's supply.

On February 6, 1973, Detective Nieves met Carroll and followed him to a service station. There he observed Defendant Croce engaging in conversation with Nevado and Graziano Rizzo (850). The officer gave Carroll $2000, but Carroll stated that Nevado did not want to do any more business because the Feds were around (851). Croce and Rizzo then left the station and Carroll and Nevado were placed under arrest (852).

DETECTIVE ARTHUR DRUCKER, who was also involved in the Carroll and Nevado investigation, had previously placed Nevado's house under surveillance. On different dates, he observed Defendant Croce and Defendant Graziano Rizzo bring a manila envelope into Nevado's house (870-871).

After Nevado's arrest, his apartment was searched by police officers. Defendants Croce and Rizz- were also brought into this apartment. They maintained that they were only looking for girls and were clean. The officers found a manila envelope under the passenger seat of Rizzo's car (874-875).

ARGUMENT

POINT I

AS A MATTER OF LAW, MULTIPLE CONSPIRACIES WERE ESTABLISHED BY THE GOVERNMENT, AS OPPOSED TO THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT. SINCE THIS VARIANCE BETWEEN THE INDICTMENT AND THE PROOF AFFECTED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL, HIS CONSPIRACY CONVICTION MUST BE DISMISSED AND A NEW TRIAL ORDERED ON THE SUBSTANTIVE COUNTS.

This Court has repeatedly admonished the Government to terminate their practice of lumping a number of conspiracies into a single conspiracy indictment. United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974); United States v. Miley, 513 F. 2d 1191 (2d Cir., 1975). Unfortunately, the Government has steadfastly refused to obey this directive and the present case is no exception.

An analysis of the evidence, viewed in a light most favorable to the Government, clearly demonstrates that the proof adduced at the trial, instead of establishing the single conspiracy alleged in the indictment, established at least three separate conspiracies which took place at three different time intervals. United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975).

The moving forces behind the first conspiracy were Manfredonia and Defendant Iarossi, who formed a partnership encompassing the period of March 1967 through 1970. Vincent

Papa was their prime source of heroin and Defendant Panebianco was an infrequent alternate source. Their main customers were Blanchard, Clark, Mobley, and Socks.

The first conspiracy came to an abrupt end in March of 1970 when Manfredonia admitted that he stopped dealing in narcotics, and additionally terminated his association with Iarossi (433).

It was not until eight months later when Manfredonia formed a new association with Joe Barone that the second conspiracy commenced. During this particular period, their customers were Clark, Watson, Defendant Brooks, Defendant Blanchard, and Appellant Anatala. To satisfy their customers' requirements, they received the heroin primarily from the Queens group (Alessi, Passero, and Papa) and on other infrequent occasions, from Defendant Panebianco and the Rizzo brothers.

Although there was an overlapping of some of the parties in the first and second conspiracies, the evidence nevertheless points to distinct and separate conspiracies. Manfredonia's own admission that he quit the narcotic business for an eight month period signalled the termination of the first conspiracy. Since the Government had claimed that Manfredonia was the central figure in their "single conspiracy," the conspiracy had to come to an end when he quit. Nor did it revive when Manfredonia formed his new association some seven or eight months later. Because of this critical time gap, the Government's theory of a continual conspiracy cannot be sustained.

But even if this Court should entertain some doubts regarding the divisibility of the first and second conspiracy, the existence of the third conspiracy totally demolishes the Government's single conspiracy theory.

During 1972 and 1973, a period when even Manfredonia was out of the business, the Government proved another distinct conspiracy evolving around Collin Carroll and Nevado, who was Carroll's source of supply. These men were engaged in a completely separate enterprise and were not in any way associated with the activities of the Manfredonia group. These groups pursued their own interests without the slightest concern or contribution to the success of their predecessors. They apparently had their own customers, their own core conspirators, and their own bases of operation. United States v. Cirillo, 416 F.2d 1233 (2d Cir., 1972); United States v. Aviles, 274 F.2d 179 (2d Cir., 1959); United States v. Aquecci, 310 F.2d 817 (2d Cir., 1972). The only connection between the second and third conspiracies is the Government's proof that Graziano Rizzo and Croce were essentially free agents, who occasionally sold heroin to either the second or the third group. They had no relationship, however, to the first conspiracy.

Although the Rizzo brothers sold heroin to the latter two groups, this fact does not mean that the various groups had any interest in contributing to the success of the ventures of another group. The fact alone that the various groups were

in the same business is a wholly insufficient basis for claiming a single conspiracy. Kotteakos v. United States, 328 U.S. 750 (1945).

Further, the Government failed to demonstrate any cohesive or organized plan among the co-conspirators. They established isolated transactions occurring at different times. They did not prove that "continual involvement with each other" that "provided the common thread upon which the jury properly could find the single conspiracy charged." United States v. Calabro, 449 F.2d 889 (2d Cir., 1973). There should be some connection among the different parties to justify a finding of a single conspiracy and such a nexus did not exist in this case.

Consequently, it is submitted that the Government has failed to establish the existence of the single conspiracy which was charged in the indictment and it is further submitted that the variance between the indictment and the proof adversely affected appellant's due process right to a fair trial.

In United States v. Bertolotti, supra, this Court set forth various factors which in its opinion would make the variance material and require a reversal. The Court stated that the "possibility of prejudice resulting from a variance increases with the number of defendants tried and the number of conspiracies proven." Appellant Anatala has

more than satisfied his burden in this regard. He was forced to proceed to trial on an indictment along with twelve named co-defendants, and eleven additional co-conspirators. Such a large number of parties should raise a clear-cut inference of prejudice. Coupling the number of parties in the case with the additional factor that three separate conspiracies were proven by the Government, magnified the prejudice inuring to Appellant. This is especially true in light of the minor role that Appellant played in the second conspiracy. The evidence demonstrates that he was only briefly involved in this conspiracy. He entered the conspiracy in 1971, and his last activity relative to this conspiracy was in November of 1972. Despite his brief participation in the second conspiracy, he was held responsible for the acts of total strangers who had pursued their own objectives during a four year period. It was thus virtually impossible for Appellant to defend himself against the separate transactions conducted by his co-defendants and co-conspirators. Under such circumstances, the jury simply could not give Appellant's case the individual consideration which is required in every case, and had to lump his minimal activities with the extensive activities of his alleged cohorts.

Because Appellant's due process right to a fair trial was seriously infringed by the proof of the multiple conspiracies, this Court should dismiss the conspiracy counts against him and order a new trial on the substantive charges.

POINT II

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO A FAIR TRIAL BY AN IMPARTIAL JURY SINCE SOME OF THE JURORS HAD OVERTLY EXPRESSED THEIR HOSTILITY TO THE DEFENDANTS' CASE.

During the cross examination of Agent Carter by Appellant's attorney, Panebianco's counsel informed the court that he had heard juror number ten say "Why doesn't he stop wasting my time with these questions." The juror seemed very annoyed and then turned to speak to juror number nine. The court was additionally informed that juror number three said of Appellant's attorney, "He's got some nerve asking these questions." (1140) A third incident was reported to the court when Panibianco's attorney claimed that after his own cross examination, juror number ten again became annoyed and exclaimed "Well, he's already answered that question." (1140) In response to these serious allegations, the Assistant United States Attorney agreed that one of the jurors might have expressed annoyance outloud (1142). Under these circumstances, it was clearly incumbent upon the court to conduct a voir dire of the jury to determine if they had already formed an opinion without hearing all the evidence in the case. The court's failure to conduct such an examination, pursuant to counsels' requests, impaired Appellant's constitutional rights under both the Fifth and Sixth Amendments to a fair trial by an impartial jury.

It is well accepted that the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial jurors and the failure to accord an accused a fair hearing violates even the minimal standards of due process. Turner v. Louisiana, 379 U.S. 466 (1965).

In this case, it is evident that at least jurors number three and ten were partial to the Government's case and had already made up their minds concerning Appellant's culpability. In their view, any further cross examination of the Government's witnesses would be a "waste of time." The court, in refusing to conduct the requested voir dire, relied on its opinion that the incident was unavoidable since the jury was composed of human beings with feelings. It is precisely because of this fact that such a voir dire was necessary. The jurors are inexperienced as to their duties in a criminal case and must be instructed by the court regarding how to perform their critical functions. They must not be guided by their feelings, but must only be guided by the law as given to them by the court. By permitting the jurors to be negatively predisposed towards the defendants before the conclusion of the entire case, the court in effect thwarted the cardinal principal of every criminal trial - that is the strong belief that a defendant is presumed innocent until proven guilty. And such a presumption accompanies him to the conclusion of the entire case.

The danger of permitting the jury to discuss the case amongst themselves was succinctly set forth by the Eighth Circuit in Winebrenner v. United States, 147 F.2d 322 (8th Cir., 1945) when it stated:

> If, however, the jurors may discuss the case among themselves, either in groups of less than the entire jury, they are giving premature consideration to the evidence. By due process of law is meant 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgement only after trial.' The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel. 148 F.2d at p. 328

Moreover, the jurors, who were unfavorably impressed with Appellant's case, could very well have influenced the other jurors to support their position. The juror would select only that evidence which would confirm his position and once having formed his opinion, he would surely hesitate to change that opinion after the case had been submitted to the entire jury. Naturally, he would make every effort to have his fellow jurors adopt his preconceived viewpoint of the evidence. Hence, the court's refusal under these circumstances, to take any corrective measures cannot be condoned.

An examination of other cases, although few in number, clearly demonstrate that it was incumbent upon the court to take some type of corrective action.

In Winebrenner v. United States, supra, the Eighth Circuit condemned the trial court's refusal to admonish the jury that they should not discuss the case nor form any opinion as to the guilt or innocence of the defendant until the case had been submitted to them. Admittedly, in the present case, such an admonition was given by the court. Nevertheless, when it was brought to the court's attention that some of the jurors were disregarding its instructions and had formed opinions about the case, the court should have questioned those particular jurors and should have issued stronger cautionary instructions at that time.

In United States v. Nance, 502 F.2d 615 (8th Cir., 1974), the defendant, after the verdict, alleged that the jurors had failed to obey the court's admonition not to discuss the case during the pendency of the trial. The appeals court did not give credence to such an allegation, since it was submitted after the verdict. Of course, in this case, counsel promptly brought the matter or jury misconduct to the court's attention during the trial when the court clearly had the opportunity to take some corrective measure. See also United States v. Klee, 494 F.2d 394 (9th Cir., 1974).

And finally, in Milam v. United States, 322 F.2d 104 (5th Cir., 1963), a case analagous to the factual situation presented here, the defendant claimed that his motion to set aside the verdict should be granted since one juror told two other jurors that if he were a witness

in this case, he would sue the defense lawyer for all he was worth for the way he was harassing the witnesses. The court denied the motion, but offered to excuse the juror who made the remark and substitute an alternate juror. Although counsel insisted that he felt that the whole jury was tainted, the court made every effort to accord the defendants a fair trial by discharging the offending juror and instructing the jury. However, in this case, the court made no effort to protect the defendants, although the remarks made by jurors numbers three and ten must be deemed equally as offensive as the juror's remarks in Milam.

Under the circumstances of this case, it should be found that the court's failure to take any corrective actions impaired Appellant's right to a fair and impartial jury, thereby mandating that his conviction be reversed and a new trial ordered.

POINT III

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28(i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEFS FOR OTHER APPELLANTS ARE INCORPORATED BY REFERENCE.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE CONSPIRACY COUNT SHOULD BE DISMISSED IN ACCORDANCE WITH POINT I AND IN ACCORDANCE WITH BOTH POINTS I AND II, APPELLANT SHOULD BE GRANTED A NEW TRIAL.

May, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Respondent.,

- against -

PATSY ANATALA,
Defendant-Appellant.

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 9th *day of* June *19*76 *at* One St. Andrews Plaza, New York, New York

deponent served the annexed Brief *upon*

Robert B. Fiske Jr.

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 9th
day of June *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977

victor ortega

VICTOR ORTEGA